

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DONALD H. BUTLER**  
Claimant

VS.

**GENERAL MOTORS CORPORATION**  
Respondent,  
Self-insured

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Docket No. 261,584

**ORDER**

Claimant appealed the November 13, 2001 Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on May 14, 2002.

**APPEARANCES**

Michael R. Wallace of Shawnee Mission, Kansas, appeared for claimant. Ronald A. Prichard of Kansas City, Missouri, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award.

**ISSUES**

This is a claim for a series of accidents and repetitive trauma to the right shoulder through August 15, 2000, when claimant underwent right shoulder surgery. Judge Foerschler denied claimant's request for benefits after finding that claimant had failed to prove that he injured his shoulder at work and after finding that claimant had failed to prove he gave respondent timely notice of the accidental injury.

Claimant contends Judge Foerschler erred. Claimant argues the evidence establishes that he injured his shoulder from his overhead work activities. In addition, claimant argues that he provided respondent with notice of his accidental injury as it developed and, if that information was not sufficient to satisfy the notice requirement, then

there was just cause to extend the period for giving notice from 10 days following the accident to 75 days. Accordingly, claimant requests the Board to award him benefits for an 18 percent functional impairment to the right upper extremity and shoulder.

Conversely, respondent contends the Award should be affirmed. Respondent argues there is no credible evidence to establish the cause of the right shoulder injury and, therefore, there is only speculation as to whether claimant sustained an accidental injury arising out of and in the course of employment. Respondent also argues it did not receive timely notice of the accident as notice was not provided within 10 days of claimant's last day of work before leaving work for the shoulder surgery.

The only issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?
2. If so, did claimant provide respondent with timely notice of the accidental injury?
3. If so, what is the nature and extent of claimant's injury and disability?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Board finds and concludes:

The Award denying benefits should be affirmed. For the reasons below, the Board finds that claimant injured his right shoulder at work but, on the other hand, the Board also finds that claimant failed to provide respondent with timely notice of the accidental injury.

Claimant is a long-term employee who worked for respondent for approximately 33 years before retiring in July 2001. In approximately March or May 2000, claimant began experiencing right shoulder symptoms. At that time, claimant's job as a repairman required him to dismantle automotive exhaust systems and to change gas tanks. The work was heavy and required much overhead activity. Claimant sought medical treatment from his personal physician and on August 15, 2000, underwent right shoulder surgery.

Due to the nature of claimant's work as a repairman and the history of injury, the Board finds and concludes that claimant's work activities more probably than not caused his right shoulder injury.

Once claimant's shoulder symptoms began, claimant told his supervisor that he was having trouble lifting his arm above his shoulder. But claimant testified that he could not recall whether or not he told his supervisor his symptoms were related to his work. Before

undergoing surgery in August 2000, claimant prepared a claim form for sickness and accident benefits in which he indicated that his “disability” was not caused by his employment. On that form, which is dated August 15, 2000, claimant checked “no” where he was asked “Do you claim that this disability was caused by your work for General Motors or any other employer?” Additionally, claimant also checked “no” on the form where he was asked “Do you claim that this disability was caused by an accident?”

Claimant explained he provided the above answers in the sickness and accident claim form as he had an earlier workers compensation claim for carpal tunnel syndrome and was instructed at that time to prepare his sick leave request in that manner as a workers compensation claim would be filed after he had returned to work. Claimant testified that he assumed the shoulder injury would be handled in the same manner.

Claimant also explained that he checked the “no” box in the above-mentioned claim form when asked if his condition was caused by an accident as he did not consider a repetitive motion injury an accident because he had neither fallen nor been hit.

Claimant’s last day of work before surgery was August 14, 2000. Claimant did not notify respondent that he had injured his shoulder at work until approximately October 9, 2000, when he returned to work following shoulder surgery. At that time, claimant prepared a written claim for workers compensation benefits.

The Board concludes claimant failed to provide respondent with notice of the accident or injury within 10 days of the last date that he worked before leaving work for surgery. Likewise, the Board finds that claimant has failed to establish just cause to extend the period of providing notice to 75 days.<sup>1</sup> Claimant’s testimony explains why he prepared the sickness and accident form in such manner but that testimony does not explain why he did not otherwise notify respondent that his work was aggravating his shoulder. Accordingly, the Board concludes claimant has failed to provide respondent with timely notice. For that reason, the Board affirms the Judge’s conclusion that claimant’s request for benefits should be denied.

The Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

### **AWARD**

**WHEREFORE**, the Board affirms the November 13, 2001 Award entered by Judge Foerschler.

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<sup>1</sup> See K.S.A. 44-520.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant  
Ronald A. Prichard, Attorney for Respondent  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director